Petition

No. 81-179

Office-Supreme Court, U.S.
FILED
JUL 27 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1981

ALICE J. HOFFMAN,

Petitioner,

vs.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

5280 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTIONS PRESENTED

1. Whether the complaint filed by petitioner stated a claim of unlawful discharge predicated upon sex discrimination in violation of 42 U.S.C. §2000e *et seq.*?

2. Whether the courts below were justified in determining that petitioner was not entitled to an evidentiary hearing and that summary judgment was properly granted to the respondents (Title VII, Civil Rights Act of 1964, §701 *et seq.*, as amended 42 U.S.C.A. §2000e *et seq.*)?

3. Whether sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the respondent's firm of the same gender as petitioner are affected (Civil Rights Act of 1964, §701 *et seq.*, as amended 42 U.S.C.A. §2000e *et seq.*; Fifth Amendment, United States Constitution)?

PARTIES

The parties before the United States Court of Appeals for the Second Circuit were the petitioner herein and the respondents herein.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Reasons For Granting the Writ:

I. The courts below erred in holding that as a matter of law no violation of Title VII occurred. It is irrelevant that only petitioner was the subject of discrimination. Title VII mandates liberal construction. 11

II. It was improper to have granted summary judgment to the respondents in the court below, thus depriving petitioner of any meaningful adversary proceeding, discovery, or other access to information. The burden should have been shifted to the respondents to disprove the allegation made. 19

Conclusion 23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977) 15, 16, 17, 18, 23

Barnett v. W.T. Grant Company, 518 F. 2d 543 22

British Airways Board v. Boeing Company, 585 F. 2d 946 . 21

Calage v. University of Tennessee, 544 F. 2d 297 22

Conrad v. Delta Airlines, Inc., 494 F. 2d 914 21

Craig v. Department of Health, Ed. and Welfare, 581 F. 2d 189 18

Davis v. Valley Distributing Corp., 522 F. 2d 827 18

Dickerson v. United States Steel Company, 439 F. Supp. 55. 22

Dothard v. Rawlinson, ___ U.S. ___, ___, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977) 14

Egelston v. State University College at Geneseo, 535 F. 2d 752 21

Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) 14

Hauck v. Xerox Corp., 493 F. Supp. 1340 18

Contents

Page

Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1955) 17

Hummel v. Riordon, 56 Fed. Supp. 983 ..... 21, 22

Kedra v. City of Philadelphia, 454 F. Supp. 652 22

Kinsey v. First Securities, Inc., 557 F. 2d 831 22

Laffey v. Northwest Airlines, 366 F. Supp. 763 (D.D.C. 1974), aff'd in part and reversed in part, No. 74-1791 (D.C. Cir. Oct. 20, 1976) 14

Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976). 17

Quinn Company, Inc. v. Mazza, 296 F. 2d 441 22

Robinson v. Lorillard Corp., 444 F. 2d 791, 21 A.L.R. Fed. 453 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S. Ct. 573, 30 L. Ed. 2d 655 (1971) 14

Rodriguez v. Board of Education, 620 F. 2d 362 (2 Cir.).. 21

Rogers v. International Paper Co., 510 F. 2d 1340 (5th Cir.), vacated on other grounds, 423 U.S. 809, 96 S. Ct. 19, 46 L. Ed. 2d 29, amended on other issues, 526 F. 2d 722 (5th Cir. 1975) 14

Rosenfeld v. Southern Pac. Co., 444 F. 2d 1219 (9th Cir. 1971) 14

United States v. Bethlehem Steel Corp., 446 F. 2d 652 (2d Cir. 1971) 14

Contents

Page

United States v. Chesapeake & O. Ry., 471 F. 2d 582 (4th Cir. 1972), cert. denied, 411 U.S. 939, 93 S. Ct. 1893, 36 L. Ed. 2d 401 (1973) 14

United States v. N.L. Indus., Inc., 479 F. 2d 354 (8th Cir. 1973) 14

United States v. T.I.M.E.—D.C., 517 F. 2d 299 22

Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228, 12 A.L.R. Fed. 1 (5th Cir. 1969) 14

Willingham v. Macon Tel. Publishing Co., 507 F. 2d 1084, 26 A.L.R. Fed. 1 (5th Cir. en banc 1975) 16

Willmar Poultry Company v. Morton Norwich Products, Inc., 520 F. 2d 289 21

Statutes Cited:

28 U.S.C. §§1254(1) and 1257 2

42 U.S.C. §2000e ..... i, 3, 11, 12

42 U.S.C. §§2000e-2 et seq. 2, 11

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) 12

United States Constitution Cited:

Fifth Amendment ..... i, 2

Fourteenth Amendment 2

Contents

Page

Other Authorities Cited:

110 Cong. Rec. 2577 (1964) 12

110 Cong. Rec. 2728 (1964) 16

110 Cong. Rec. 2804-2805 (1964) 12

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 45 12

Moore's Federal Practice, ¶56.17 21

S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971) 13

U.S. Code Cong. & Admin. News 1972, p. 2137 (1971) ... 12

APPENDIX

Summons Dated April 25, 1980 ..... 1a

Complaint 3a

Exhibit A to Complaint — Notice of Right to Sue .. 10a

Exhibit B to Complaint — Letter From U.S. Department of Labor to Petitioner's Attorneys Dated September 23, 1977, Granting Permission to Pursue Independent Legal Action 13a

Answer Dated May 13, 1980 ..... 15a

Judgment Appealed From Dated December 16, 1980..... 22a

Order and Decision of the Second Circuit 23a

No.

In The

Supreme Court of the United States

October Term, 1981

ALICE J. HOFFMAN,

Petitioner,

vs.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

There was no separate written opinion by the district judge in the Southern District of New York (Constance Baker Motley), except those incorporated in the record itself.

The judgment dismissing the complaint, by District Judge Constance Baker Motley, is annexed hereto as part of the appendix.

The decision and opinion of the Second Circuit is reprinted in the appendix herein.

JURISDICTION

(a) The order sought to be reviewed was dated April 28, 1981. It affirmed, with a brief opinion, the order and judgment of the United States District Court for the Southern District of New York granting summary judgment to the respondents herein, which judgment was entered on December 16, 1980.

(b) There has been no intermediate order entered by the Second Circuit with respect to any rehearing or reconsideration.

(c) Jurisdiction to review the judgment and order of the courts below by certiorari is conferred by 28 U.S.C. §§1254(1) and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment:

> "No person shall be deprived of life, liberty or property without due process of law."

The Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment:

> "No person shall be deprived of life, liberty or property without due process of law . . . nor denied the equal protection of the laws . . . ."

42 U.S.C. §§2000e-2 *et seq.;* Pub. L. No. 88-352, 78 Stat. 255 (1964), as amended:

"Congress made it an unlawful employment practice for employers with certain exceptions not presently relevant 'to . . . discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex . . .'."

STATEMENT OF THE CASE

Petitioner instituted this lawsuit in the Southern District of New York pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.*

Petitioner claimed that she was discharged from her employment because of sex discrimination. The respondents served an answer, but before the petitioner had any opportunity to conduct any examinations before trial or gain any type of other discovery, respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted and upon the grounds of *res judicata* and collateral estoppel.

Judge Constance Baker Motley dismissed the complaint for failure to state a claim and because petitioner had not proved her case.

In the oral argument on appeal the respondents conceded that they were wrong in invoking the doctrine of *res judicata* since it did not apply, and withdrew that defense.

Contrary to the assertions of the respondents in the court below, there were no true adversary proceedings conducted in this lawsuit. We, of course, are referring to the proceedings in the United States District Court and any proceedings antedating that court.

Petitioner Alice J. Hoffman was employed as a legal secretary by the respondent firm. She worked in this capacity from May 1976 to February 1977.

She graduated both as president of her high school class and as its valedictorian. She attended college and also was a graduate of a secretarial institute.

There were no truly adversary proceedings at all in view of the fact that prior to the District Court complaint being filed by the petitioner herein, there had been proceedings before the Equal Employment Opportunity Commission (hereinafter called "EEOC") and at the direction of the EEOC, a hearing before the City Commission on Human Rights (hereinafter called "CCHR").[1]

Petitioner was assigned to the respondent firm's negligence department and worked for two partners, Mr. Haber and Mr. Shapiro, as well as for an associate, Mr. Bunim.

It is important to note that not once, until after her discharge and the commencement of proceedings many months following that discharge, were any claims at all asserted by the respondents that petitioner's work was incompetent or that she was insubordinate (A45, 50, 57).[2]

---

1. Petitioner has maintained that there were gross irregularities in the conduct of the hearings of the CCHR because *ex parte* conferences were held with members of the respondent firm and meaningful cross-examination was totally denied. No adversary proceeding at all was held involving respondents and petitioner before the EEOC. Scheduled witnesses from respondent firm for unexplained reasons never appeared..

2. Numerals in parentheses preceded by the prefix "A" refer to pages of the appendix in the United States Court of Appeals for the Second Circuit.

During the time that petitioner was employed by the respondents, all of the attorneys in the firm were male and all of the secretaries were female (A6).

Shortly following her employment with respondents, an attorney by the name of Feldman approached her and made a "pass" at her. While at first ignored, Feldman stopped several times at petitioner's desk for "social" conversation. Petitioner, who is single, openly invited Feldman to spend the day at a beach near her house and to have dinner, but after some hemming and hawing, he declined, saying that he was resuming a relationship with an old girlfriend and wouldn't feel comfortable in petitioner's presence.

Petitioner considered that an end to the matter, but Feldman continued to pass her desk and smile effusively when he did.

About six weeks later, petitioner learned from the assistant bookkeeper that Feldman, the male attorney involved herein, was apparently seeking confidential information from her personnel file and was being assisted by the main bookkeeper.

Miss Hoffman reported this to Mr. Haber, one of the partners for whom she worked, and after a couple of ten-minute conversations, let the matter drop.

About three months later, petitioner was hostilely addressed by a file clerk with the firm, a female whom Hoffman did not even know.

This disconcerted Miss Hoffman, who mentioned the matter to Mr. Dunim, an associate for whom he also worked. She suspected that Feldman might be instigating this sarcasm and hostility on the part of fellow employees, and informed Mr.

Bunim about Feldman's interest in obtaining confidential information from her personnel file and that she had heard that he had made derogatory remarks about her.

The matter was ultimately called to the attention of the managing partner, Mr. Spett, and he thanked petitioner for informing him of Mr. Feldman's activities, and confirmed that personnel files were strictly confidential. He informed petitioner that the bookkeeper would be cautioned not to divulge any personnel matters to Mr. Feldman, or anyone other than partners.

A couple of days later petitioner learned from the assistant bookkeeper that apparently the admonitions of Mr. Spett were not being obeyed, and another complaint was made to Mr. Spett.

Two days after that, when Mr. Spett was on vacation, the personnel manager threatened the petitioner with loss of her employment because she had been speaking up for her rights of confidentiality.

Other incidents occurred whereby personnel began talking to Mr. Feldman, in her presence, of disclosing the information, apparently attempting to taunt the petitioner.

While petitioner complained she could never speak with the personnel manager, she learned of a determination that Mr. Feldman had done nothing wrong and that he had been wrongfully accused by the petitioner.

Within a week following her last discussions, petitioner claims that she was fired for having spoken up too much. Miss Hoffman claims that she had never been given an opportunity to tell her side of the story to the personnel manager.

Petitioner had only two conversations to make the initial complaints, and only two more conversations after being threatened by the personnel manager which was to clarify petitioner's status as an employee.

Sexual discrimination was predicated, in part, upon the fact that the personnel manager had determined, after conferring *ex parte* with Mr. Feldman and a file clerk, and without affording petitioner an opportunity to tell her side of the story, that nothing wrong had been done and that Mr. Feldman had been wrongfully accused.

Mr. Spett, one of the managing partners, had assured petitioner all along that her personnel files were confidential *vis a vis* all coworkers including Feldman, and that she had a right to expect such confidentiality. Yet, when Mr. Spett went on vacation, the personnel manager issued a threat to petitioner for having spoken up too much.

Petitioner had submitted the information in the first place because it was her understanding that the personnel files were strictly confidential.

After her discharge, although she had been given a bonus and a pay raise at the end of 1976 for excellent work, the respondents suddenly informed the EEOC that her performance in her job duties had been incompetent and that she was otherwise unkempt in her appearance. This, too, petitioner maintains, was conjured up and was wholly untrue. It had never been mentioned previously, until many months after her discharge and, despite the bonus and raise in pay which she had received. Petitioner claims that this was a malicious slander, in addition to all of the other aspects of her complaints.

It must be borne in mind that petitioner has vehemently denied "persisting in making complaints about the file matter."

She denies that she was overbearing or in any way paranoid about these matters. The statement made during the proceedings in the United States Court of Appeals that she was told to seek psychiatric help is adamantly denied by petitioner as well. Moreover, petitioner has sought to prove, but has been unable to do so because of the lack of an adversary proceeding, that she was hurt substantially in her career and was unable to obtain employment for a protracted period of time following her discharge, nor did she ever use the word "conspiracy" with respect to coworkers in connection with Mr. Feldman's activities.

The respondents' claim that they took the word of Mr. Feldman over that of the petitioner, but in addition had the views of three other female employees.

This however, does not negate petitioner's charge of sex discrimination since at least two of these female employees said they were helping Mr. Feldman get information from petitioner's file, and thus in effect, respondent was taking Feldman's word over petitioner's, by accepting the word of these other female employees.

Even during an unemployment insurance hearing, no adversary proceeding was afforded since the respondent was not a party, but only a witness. There, too, petitioner maintains *ex parte* contacts were maintained between the unemployment insurance referee and the respondents.

It was never denied at the proceeding in the United States Court of Appeals that a policy of confidentiality existed with respect to personnel files, although previously thereto there had been insinuations to the contrary by the respondents.

The conversations which Miss Hoffman had with personnel of the respondent firm, such as the partners, Mr. Spett, Mr.

Modlin and Mr. Schlesinger, were not in any way, shape or form improper, but necessarily were required to assure Miss Hoffman of her job status in view of the threat made by the personnel manager for speaking up too much. She also had to, of course, inform the firm of the improprieties of Mr. Feldman.

During the course of her employment, Miss Hoffman learned that a secret memorandum was being prepared and that some of the staff had been at a meeting after work to revel in its smut. Miss Hoffman reported this discovery to Mrs. Sotsky, who soon returned to tell her in effect that the memorandum had been destroyed. This, however, confirmed the existence of the memorandum and its slanderous nature (A52). Mrs. Sotsky was, and had been, during the course of her employment, petitioner's personnel manager, thus holding an important supervisory position.

Thus, the following facts should have been litigated before the district judge, but the granting of summary judgment to respondent precluded any factual determinations:

1. Employee personnel files were, and are, confidential (A70, 71).

2. Mr. Feldman was trying to get data from petitioner's file and won the cooperation of other employees to this end, and Mr. Spett admitted that Mr. Feldman was attempting to do so (A55).

3. Mr. Feldman was circulating rumors about Miss Hoffman, and Mr. Haber and Mr. Bunim confirmed that he was doing so (A55).

4. Mr. Modlin, Mr. Spett, and Mr. Haber, respondent's partners, all encouraged petitioner to stand up for her rights, but then, in essence, conspired to fire her for speaking up too much (A55).

5. The personnel manager, with knowledge of Mr. Feldman's activities, is claimed to have recommended Miss Hoffman's discharge, although she had earlier confirmed that a disparaging memorandum was being prepared, likely at the behest of Mr. Feldman (A52).

There was ample other evidence of Feldman's attempts to humiliate and embarrass Miss Hoffman. The excuse that she was fired for speaking up too much was obviously just a pretext.

It is not denied by the respondent that the petitioner received a pay raise and a bonus at the end of 1976 as a result of formal evaluations "used in determining pay increases at the end of the year . . ." (A75), thus putting the lie to the assertion that petitioner was incompetent, insubordinate, and inefficient. Thus, petitioner at no time has had a truly adversary proceeding and has not been able to obtain necessary discovery or particulars.

The personnel manager threatened petitioner for having asserted her rights to confidentiality. This in essence nullified the policy of respondents, and thwarted Hoffman's rights, thus further exacerbating her sex discrimination charge.

REASONS FOR GRANTING THE WRIT

I.

The courts below erred in holding that as a matter of law no violation of Title VII occurred. It is irrelevant that only petitioner was the subject of discrimination. Title VII mandates liberal construction.

By adoption of Title VII of the Civil Rights Act of 1964 (Pub. L. No. 88-352, 78 Stat. 255 (1964), as amended, 42 U.S.C. §§2000e-2, *et seq.* (1970), Congress made it an unlawful employment practice for nongovernmental employers, with exceptions not presently relevant, "to . . . discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ."[3] Unfortunately, the early history of

3. In relevant part the Act provides:

> "It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Civil Rights Act of 1964, tit. VII, §703, as amended, 42 U.S.C. §2000e-2(a) (1970 and Supp. II 1972).

that legislation lends no assistance to endeavors to define the scope of this prohibition more precisely, if indeed any elucidation were needed. It was offered as an addition to other proscriptions by opponents in a last-minute attempt to block the bill which became the Act,[4] and the bill, with the amendment barring sex-discrimination, then quickly passed.[5] Thus, for an eight-year period following its original enactment, there was no legislative history to refine the congressional language.

When, however, the 1964 Act was amended by the Equal Employment Opportunity Act of 1972,[6] there was considerable discussion on the topic. Not surprisingly, it then became evident that Congress was deeply concerned about employment discrimination founded on gender, and intended to combat it as vigorously as any other type of forbidden discrimination. The report of the House Committee on Education and Labor declared in ringing tones that the statute—eight years after passage—still had much to accomplish in order to elevate the status of women in employment:[7]

> "Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.
>
> Such blatantly disparate treatment is particularly objectionable in view of the fact that

4. *See* 110 Cong. Rec. 2577 (1964) (remarks of Representative Smith); *id.* at 2581-2582 (remarks of Representative Green).

5. *See* 110 Cong. Rec. 2804-2805 (1964); *id.* at 14511; *id.* at 15897.

6. Pub. L. No. 92-261, 86 Stat. 103 (1972); 42 U.S.C. §§2000e *et seq.* (Supp. II 1972).

7. H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 45; U.S. Code Cong. & Admin. News 1972, p. 2137 (1971).

> Title VII has specifically prohibited sex discrimination since its enactment in 1964."[8]

The Committee emphasized that women's employment rights are not "judicial divertissements,"[9] and that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."[10] The report of the Senate Committee on Labor and Public Welfare reveals a similar commitment to eradication of sex discrimination:[11]

> "While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics."[12]

---

8. *Id.*

9. *Id.* at 5.

10. *Id.*

11. S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971).

12. *Id.* at 7.

Not unexpectedly, then, during the thirteen years since enactment of Title VII it has become firmly established that the Act invalidates all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of... impermissible classification[s]."[13] Title VII has been invoked to strike down a wide variety of impediments to equal employment opportunity between the sexes, including insufficiently validated tests,[14] discriminatory seniority systems,[15] weight-lifting requirements,[16] and height and weight standards solely for those of one gender.[17] Congress could hardly have been more explicit in its command that there

---

13. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158, 164 (1971).

14. *Griggs v. Duke Power Co., supra*, note 34; *Rogers v. International Paper Co.*, 510 F. 2d 1340, 1348 (5th Cir.), *vacated on other grounds*, 423 U.S. 809, 96 S. Ct. 19, 46 L. Ed. 2d 29, *amended on other issues*, 526 F. 2d 722 (5th Cir. 1975); *United States v. N.L. Indus., Inc.*, 479 F. 2d 354, 371-372 (8th Cir. 1973).

15. *United States v. Bethlehem Steel Corp.*, 446 F. 2d 652, 658-659 (2d Cir. 1971); *United States v. Chesapeake & O. Ry.*, 471 F. 2d 582, 588-589 (4th Cir. 1972), *cert. denied*, 411 U.S. 939, 93 S. Ct. 1893, 36 L. Ed. 2d 401 (1973); *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 799-800, 21 A.L.R. Fed. 453 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S. Ct. 573, 30 L. Ed. 2d 655 (1971); *United States v. N.L. Indus., Inc., supra* note 35, 479 F. 2d at 366-367.

16. *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 234-236, 12 A.L.R. Fed. 1 (5th Cir. 1969). *Cf. Rosenfeld v. Southern Pac. Co.*, 444 F. 2d 1219, 1225-1227 (9th Cir. 1971).

17. *Laffey v. Northwest Airlines*, 366 F. Supp. 763, 790 (D.D.C. 1974), *aff'd in part and reversed in part*, No. 74-1791 (D.C. Cir. Oct. 20, 1976). The Supreme Court has also outlawed height and weight strictures which, although applicable to both sexes, have a disproportionate impact on women. *Dothard v. Rawlinson*, ___ U.S. ___, ___, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (1977).

be no sex-based discrimination "against any individual with respect to his . . . terms, conditions, or privileges of employment . . . ."

In the case of *Barnes v. Costle,* 561 F. 2d 983 (D.C.Cir. 1977), the United States Court of Appeals held that sexual harassment by a male employee seeking sexual attention and favors from the petitioner were within the purview of Title VII of the Civil Rights Act.

It cannot be doubted but that Feldman's treatment of the petitioner was a form of sexual harassment. His initial contact and flirting with her was because she was a woman, since there is no allegation here that Feldman was anything other than heterosexual.

It is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job.

The record, in its current posture, portrays a superior placing a female subordinate in a substantial employment condition which he would not seek to levy upon a man. This situation is quite different from instances of sexual affairs between employees of the same employer which are not tied to employment opportunity in any way.

Thus, if the District Court is interpreted as having held in effect that petitioner was discriminated against, not because she was a woman, but because she refused or objected to the sexual flirting or overtures of Mr. Feldman, we maintain the District Court was wrong. The conditions of petitioner's employment became intolerable because of the activities of Feldman and the people who were cooperating with him, namely the personnel manager and so forth.

But for her womanhood, from aught that appears, the sexual harassment by Feldman would never have been solicited, nor would the activities have been tolerated.

Put another way, petitioner became a target of Feldman's sexual harassment because she was a woman. There is no evidence that any male employee was similarly treated. Thus we maintain that gender cannot be eliminated from the formulation which petitioner advocates, and the formulation advances a *prima facie* case of sex discrimination within the purview of Title VII.

It is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way.[18] That this was the intent of Congress is readily apparent from a small but highly significant facet of the legislative history of Title VII. When the bill incorporating Title VII was under consideration in 1964, an amendment that would have expressly restricted the sex ban to discrimination based solely on gender was defeated on the floor of the House.[18]

The court in *Barnes v. Costle, supra,* like the Fifth Circuit, took as an indication of congressional awareness the debilitating effect that such a limitation would have had on any attempt to stamp out sex-based factors irrelevant to job competence. (*Willingham v. Macon Tel. Publishing Co.*, 507 F. 2d 1084 at 1089, 26 A.L.R. Fed. 1 (5th Cir. en banc 1975).

Interpretations of the Act, both judicial and administrative, more than adequately reflect this understanding and appreciation of the legislative purpose.

---

18. 110 Cong. Rec. 2728, 13825 (1964).

Thus, as long as gender is involved to any significant degree, it is irrelevant that other objectionable employment conditions also existed. And even if some, but not all, of employees of the same sex are subjected to the complained-of condition, the violation nevertheless occurs.

Nor was there any indication that once the complaint was received by top management that they did anything effectively to stop it [*e.g., Miller v. Bank of America,* 418 F. Supp. 233, 235-236 (N.D. Cal. 1976); *Howard v. National Cash Register Co.,* 388 F. Supp. 603, 605-606 (S.D. Ohio 1955)].

In *Barnes v. Costle, supra,* the Court of Appeals aptly observed (at 993):

> "*If,* on the other hand, the court was saying that there was no actionable discrimination because only one employee was victimized, we would strongly disagree. A sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant's gender are affected. The protections afforded by Title VII against sex discrimination are extended to the individual, and 'a single instance of discrimination may form the basis of a private suit.' To briefly illustrate, suits have been entertained where a woman charged that she was fired because she was pregnant and unmarried, notwithstanding the fact that no other woman was discharged for that reason, and where a male nurse asserted that he was denied assignments to care for female patients, although no allegations were made with respect to the assignment of other male nurses. Close analogies emerge from situations wherein a

> black woman was terminated ostensibly for personality conflicts but allegedly was told that she probably did not need the job anyway because she was married to a white male, and where a white woman attributed loss of her job to her relationship with a black man. In each of these instances, a cause of action was recognized although it did not appear that any other individual of the same gender or race had been mistreated by the employer."

The Fifth Circuit in *Barnes v. Costle, supra* (*id.* at 994), observed that at no time during its intensive study of the statute did it encounter anything to support the notion "that employment conditions summoning sexual relations between employees and superiors are somehow exempted from the coverage of Title VII."

It is obvious that the statute in explicit terms proscribes discrimination "because of sex". The legislative history similarly discloses a congressional purpose to outlaw any and all sex-based discrimination, equally with any other form of discrimination which Title VII condemns.

Liberal construction is mandated in the interpretation of Title VII. (*See Barnes v. Costle,* 561 F. 2d at 994; *Davis v. Valley Distributing Corp.*, 522 F. 2d 827 at 832; *Hauck v. Xerox Corp.*, 493 F. Supp. 1340 at 1349; *see also, Craig v. Department of Health, Ed. and Welfare,* 581 F. 2d 189 at 191, 192, 193).

In *Barnes v. Costle, supra,* the court aptly noted:

> "It would be pointless to speculate as to whether Congress envisioned the particular type of activity which the job-retention condition

allegedly levied on appellant would have exacted. As Judge Goldberg of the Fifth Circuit has so well put it.

> 'Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.' [*Rogers v. EEOC*, 454 F. 2d 234, 238 (5 Cir. 1971), cert. denied, 406 U.S. 957. . .]."

II.

It was improper to have granted summary judgment to the respondents in the court below, thus depriving petitioner of any meaningful adversary proceeding, discovery, or other access to information. The burden should have been shifted to the respondents to disprove the allegation made.

We have already established that it is irrelevant that only one employee was subject to the sexual harassment herein.

Still the record discloses undeniable facts.

1. Mr. Feldman alone and with the assistance of others was attempting to obtain data from petitioner's confidential personnel file. Partners of respondents admitted that they knew this was occuring.

2. Mr. Feldman alone and with the cooperation of others

was spreading malicious and disparaging stories about petitioner. Respondents' partners admitted they knew this was occuring.

3. Mr. Feldman was likely preparing a disparaging memorandum about petitioner. Respondents' personnel manager knew of the memorandum and had it suppressed.

4. Respondents' partners repeatedly encouraged petitioner to assert her rights and congratulated her for doing so.

5. Yet on February 4, 1977 without warning, respondents fired petitioner, at which time she was told, "You spoke up too much."

6. In the EEOC proceedings and in the Human Rights Commission many months later, respondents for the first time claimed petitioner was fired for incompetence, insubordination and an unkempt appearance. Yet at the end of 1976, respondents made an evaluation of petitioner's performance and, as a result, gave her a bonus and a salary increase. At no time during her employment did respondents ever complain about petitioner's performance, obedience, or appearance.

The denials by the respondent, unfortunately, are only that. No opportunity to gain access to information in an adversary proceeding has been afforded.

That respondents are concealing unlawful motives is made apparent from their contrivances that petitioner was fired (a) for misconduct; (b) for not doing her work properly; and (c) for refusing to follow orders. These grounds have been urged at different times in different tribunals and every such reason for petitioner's discharge has been effectively and completely refuted. These excuses for her discharge having been urged and

proved false, the realistic inference is clear that respondents have something to hide — that petitioner's discharge was an act of unlawful sex discrimination.

The issues on this appeal are closely akin to those in *Rodriguez v. Board of Education,* 620 F. 2d 362 (2 Cir.). Here the court particularly made mention of the circumstance that the dismissal of the complaint by the District Court deprived appellant of discovery proceedings and a trial on the merits.

The mistake in granting the motion to dismiss the complaint arises particularly from that circumstance. Regardless of the protestations and excuses alleged by the respondents as the reasons for discharging petitioner, the truth lies in the subjective motivations for that discharge. The truth also is that every excuse given by the respondents on this motion has been answered by the petitioner and answered essentially out of statements made by the respondents themselves. Petitioner is entitled to her day in court and to the discovery proceedings available to her to establish the fact that her discharge was an act of sex discrimination.

"Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affiants. *See Moore's Federal Practice,* ¶ 56.17." *Conrad v. Delta Airlines, Inc.,* 494 F. 2d 914, 918; *Egelston v. State University College at Geneseo,* 535 F. 2d 752.

To the same effect are those cases which have denied summary judgment when essential facts are entirely within the knowledge of the moving party. *British Airways Board v. Boeing Company,* 585 F. 2d 946; *Willmar Poultry Company v. Morton Norwich Products, Inc.,* 520 F. 2d 289; *Hummel v. Riordon,* 56

Fed. Supp. 983. It is axiomatic that respondents' motives and reasons for discharging petitioner were made either as the result of a conference or conferences among them or, as they themselves allege, upon the direction of Mr. Modlin. Discovery proceedings are essential to establish the reason why the decision was made to discharge petitioner. Those facts cannot be determined on a motion for summary judgment and certainly cannot be based on self-serving statements made by the respondents themselves, which they would very much like this Court to believe.

The issue is whether or not petitioner was discharged because of unlawful sex discrimination. That is an issue of fact, and all of the excuses of the respondents cannot be automatically accepted by this or any other court. Issues of fact preclude the granting of summary judgment. *Calage v. University of Tennessee*, 544 F. 2d 297; *Kinsey v. First Securities, Inc.*, 557 F. 2d 831; *Barnett v. W.T. Grant Company*, 518 F. 2d 543; *United States v. T.I.M.E.—D.C.*, 517 F. 2d 299; *Dickerson v. United States Steel Company*, 439 F. Supp. 55.

With the denial of discovery proceedings to petitioner, she has been placed at a serious disadvantage. She has not been able to obtain the testimony of the respondents under oath. The respondents have refused to answer many of the interrogatories which were designed to supply the basis for obtaining statistical proof and the names of employee witnesses to establish petitioner's case. Respondents have been relieved from being subjected to the very discovery devices which have been made available to all parties in federal litigation. In the end, respondents have not established that they are not guilty of unlawful sex discrimination, and petitioner has been prevented from her utilization of the federal procedures to obtain necessary additional proof. The granting of the motion in the court below must be reversed. *Quinn Company, Inc. v. Mazza*, 296 F. 2d 441; *Kedra v. City of Philadephia*, 454 F. Supp. 652.

Under the circumstances, it is obvious that the petitioner is severely prejudiced by virtue of the fact that she has never been given an adversary proceeding. While the form of sexual harassment may not be typical in that it is *sui generis*, that does not by any means eliminate the fact that sexual harassment has been established *prima facie. (See Barnes v. Costle, supra.)*

This Court should overrule the determination of the courts below that summary judgment was a proper remedy and should, at the very least, reverse following a full trial.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner

APPENDIX

SUMMONS DATED APRIL 25, 1980

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 80 Civ. 2303

Judge Motley

ALICE J. HOFFMAN

Plaintiff

v.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER

Defendants

To the above named Defendants:

You are hereby summoned and required to serve upon WISHOD & FISCH plaintiff's attorneys, whose address is 1515 Broadway, New York, New York 10036 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Summons

Raymond F. Burghardt
Clerk of Court

s/ Thomas W. Aareen
Deputy Clerk

[Seal of Court]

Dated: Apr. 25, 1980

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALICE J. HOFFMAN,

Plaintiff,

-against-

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Defendants.

Plaintiff, by her attorneys, Wishod & Fisch, for her complaint alleges:

1. This action seeks relief for violations by defendants of the provisions of The Civil Rights Act of 1964, as amended, as set forth in 42 U.S.C. 2000e et seq.

2. Subject matter jurisdiction is conferred upon this Court pursuant to 42 U.S.C. 2000e 5(f).

3. This action also seeks relief pursuant to The Age Discrimination in Employment Act of 1967, as amended, as set forth in 29 U.S.C. 621 et seq.

4. Subject matter jurisdiction based upon violations of The Age Discrimination in Employment Act as above referred to is conferred upon this Court pursuant to 29 U.S.C. 626(c).

5. The acts of unlawful employment practices hereinafter set forth were committed within the territory of the United

States District Court for the Southern District of New York and more particularly at the office of defendants at No. 425 Park Avenue, New York, New York.

6. Upon information and belief, at the times hereinafter mentioned, defendants were and are a partnership engaged in the practice of law, and affected and now affect commerce, in that defendants did and still engage in the practice of law in the State of New York and other States of the United States and the District of Columbia, and did and still represent clients doing business in various States of the United States and the District of Columbia.

7. Plaintiff, a woman, was employed by defendants from May 1976 to on or about February 4, 1977 as a stenographer and legal secretary when she was discharged by defendants.

8. Upon information and belief, between May 1976 and February 4, 1977 and before said dates and since said dates, all stenographers and legal secretaries employed by defendants were and are women.

9. Upon information and belief, between May 4, 1976 and February 4, 1977 and at other times, all lawyers employed by defendants and all partners of defendants were and are male.

10. Prior to and during the time when plaintiff was employed by defendants, defendants maintained an announced policy that the personnel files of defendants' employees and all information contained therein were confidential and no information in the personnel files was permitted to be divulged to other employees of defendants. Plaintiff relied on said policy when she supplied information about herself to defendants to be placed in her personnel file.

Complaint

11. In or about the month of January 1977, the contents of the personnel file of plaintiff were disclosed to Theodore Feldman, an attorney employed by defendants, and other employees of defendants threatened to disclose other information contained in the personnel file of plaintiff to said Theodore Feldman.

12. Thereupon, plaintiff informed Murray Spett, a partner of defendant, that she had learned that said Mr. Feldman had obtained information from plaintiff's personnel file and that a breach of defendants' promise of confidentiality as to plaintiff's personnel file had occurred. Mr. Spett thereupon told plaintiff he would direct all employees having responsibility for keeping personnel records to continue to adhere to defendants' policy not to disclose the contents of personnel files and not to make the same available to any of defendants' employees.

13. Shortly thereafter, a bookkeeper employed by defendants, who had access to personnel files, stated that she would turn over information in plaintiff's personnel file to an attorney employed by defendants.

14. Immediately thereafter, plaintiff informed Mr. Spett of the facts set forth in paragraph "13" *supra.*

15. After the event set forth in paragraph "14" *supra,* a file clerk employed by defendants stated that she would supply Mr. Feldman with information contained in plaintiff's personnel file.

16. Thereafter, Emanuel Haber, an attorney, informed plaintiff that the personnel manager of defendants had spoken to Theodore Feldman and to other employees of defendants with duties in the personnel department of defendants, and had concluded, without giving plaintiff an opportunity to be heard,

that plaintiff's claims were without merit and that plaintiff's employment with defendants would be terminated if plaintiff pursued any demand that defendants continue to adhere to their stated policy of keeping personnel files and the information contained therein confidential, and took appropriate steps to correct the wrong done to plaintiff by the disclosure of the contents of her personnel file.

17. The persons interviewed by the personnel manager, as above set forth, were and are substantially younger than the age of plaintiff.

18. As a result of the statement to plaintiff that her continued employment with defendants was in jeopardy, plaintiff conferred with two additional partners of defendants for the sole purpose of finding out whether her continued employment with defendants was in jeopardy and not for the purpose of complaining about the disclosure of information contained in her personnel file.

19. On or about February 4, 1977 plaintiff was discharged and was told that the following were the reasons for her discharge: (a) that plaintiff had spoken up too much to assert her rights. (b) that plaintiff's charges had been investigated and that defendants had concluded that Mr. Feldman, as an attorney on defendant's staff, did not and would not violate defendants' rules by seeking information from plaintiff's personnel file; (c) that plaintiff had been warned not to continue to assert her rights, and (d) that plaintiff as one of defendants' older stenographers was expendable in order to avoid difficulties to any of defendants' attorneys.

20. Plaintiff's discharge was a direct result of acts of discrimination against her by reason of her female sex in that

defendants and their employees undertook an investigation of the complaints of plaintiff without interviewing plaintiff and without taking into account the facts available to plaintiff, and without furnishing her due process; in that defendants decided to protect their all-male staff of attorneys against any complaints of sex discrimination by any of their all-female staff of secretaries and stenographers; in that defendants decided to make an example of plaintiff by discharging her in order to discourage any complaints by their all-female staff of stenographers and secretaries against their all-male staff of attorneys; in that defendants discharged plaintiff because of her opposition to the unlawful practice of defendants in arbitrarily supporting their all-male staff of attorneys against any complaints by any of their female employees; and in that defendants committed acts of discrimination against plaintiff on account of her age by utilizing the circumstances to discharge plaintiff because of her complaints against Mr. Feldman and other employees, who are all younger than she.

21. On or about July 27, 1977 plaintiff filed a charge of discrimination with The Equal Employment Opportunity Commission, in which she claimed to be aggrieved by defendants because she was discharged from her employment with defendants on account of her sex.

22. Thereafter by letter dated January 23, 1980, The Equal Employment Opportunity Commission informed plaintiff that it enclosed a letter of determination and Notice of Right to Sue (Exhibit A). Said letter and enclosures were received by plaintiff on or about February 10, 1980. Less than 90 days have elapsed since plaintiff received the above.

23. Prior to September 23, 1977, plaintiff filed with the Department of Labor a Notice of Intent to Sue defendants

under The Age Discrimination in Employment Act of 1967, as amended, and by letter dated September 23, 1977, permission to pursue this action was given by said United States Department of Labor. (Exhibit B)

24. After plaintiff was discharged by defendants, plaintiff applied for employment to employment agencies but defendants falsely stated to said agencies from time to time that plaintiff was discharged for misconduct, for being unstable and for having been a party to incidents, as the exact result of which plaintiff was unable to find employment for over one year.

WHEREFORE, plaintiff demands judgment against defendants as follows:

1. Reinstatement of plaintiff in her former employment position; and

2. For a sum of money equal to plaintiff's full back pay plus benefits from the date of her discharge to the date of her reinstatement, less her interim earnings, and

3. Enjoining defendants from making false statements about plaintiff to the effect that she was discharged for misconduct, or because of any special incidents, or because of any claim of her being incompetent or hysterical, and

4. Attorneys' fees, costs and such other relief as this Court may deem just and proper.

WISHOD & FISCH

By
BERNARD WEITZMAN
A Member of the Firm
Attorneys for Plaintiff
Office & P. O. Address
1515 Broadway
New York, N.Y. 10036
Telephone No. (212) 869-0444

EXHIBIT A TO COMPLAINT — NOTICE OF RIGHT TO SUE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Dismissal)

To:

Ms. Alice J. Hoffman
195 Kensington Street
Brooklyn, New York 11235

From:

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, New York 10007

EEOC Representative	Charge Number	Telephone Number
Cherie A. Gaines, Regional Attorney	021772810	(212) 264-7188

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

Exhibit A

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S.District Court should be made well in advance of the end of the 90-day period mentioned above.*

Exhibit A

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

s/ Edward Mercado
Edward Mercado, District Director
(Typed Name and Title of EEOC Official)

Aug. 6, 1979
(Date)

Weisman Celler Spett Modlin & Wertheimer
425 Park Avenue
New York, New York 10017

EXHIBIT B TO COMPLAINT — LETTER FROM U.S. DEPARTMENT OF LABOR TO PETITIONER'S ATTORNEYS DATED SEPTEMBER 23, 1977, GRANTING PERMISSION TO PURSUE INDEPENDENT LEGAL ACTION

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Manhattan Area Office
26 Federal Plaza — Room 2946
New York, N.Y. 10007

Telephone: 254-8183

September 23, 1977

Hockert Pressman & Flamm, Esq.
880 Third Avenue
New York, N.Y. 10022

Attention: Leonard N. Flamm, Esq.

Gentlemen:

Recently you gave the Secretary of Labor notice of intent to sue Weisman, Cellar, Et al, under the Age Discrimination in Employment Act of 1967, on behalf of your client, Alice Hoffman. The firm was advised of the notification, and action was taken to try to eliminate the alleged unlawful practice by informal methods of conciliation, conference, and persuasion as the Act requires.

Our efforts by way of informal conferences to resolve the alleged grievance were unsuccessful.

Exhibit B

You are informed that you may now exercise your prerogative to pursue independent legal action.

Sincerely yours,

s/ Norman Bromberg

Norman Bromberg

cc: Alice Hoffman
/o Hockert, Pressman & Flamm, Esq.

ANSWER DATED MAY 13, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALICE J. HOFFMAN,

Plaintiff,

-against-

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Defendants.

Civil Action File #80 Civ. 2380
(CBM)

The defendant, Weisman, Celler, Spett, Modlin and Wertheimer, a firm of attorneys duly admitted to the practice of law in the State of New York, and appearing in this action pro-se, as and for its answer to the complaint herein, respectfully shows this Court and alleges as follows:

FIRST: The defendant denies each and every allegation of the complaint contained in the paragraphs thereof numbered "5," "10," "11," "12," "16" through "20," inclusive and "24."

SECOND: The defendant denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the complaint numbered "21" and "23."

THIRD: The defendant denies, upon information and belief, the allegations contained in the paragraphs of the complaint numbered "8," "13" and "15."

FOURTH: Defendant denies the allegations contained in paragraph "4" of the complaint except admits the Court has subject matter jurisdiction if this action was timely commenced and plaintiff had otherwise complied with those applicable statutes in such cases made and provided.

FIFTH: Defendant denies the allegations contained in paragraph "6" of the complaint except defendant admits that at all times pertinent to this action defendant was and still is a firm of attorneys duly authorized to practice law in the State of New York, that defendant did and still does practice law in the courts of the State of New York and of the United States of America and represents clients from various states and localities under the jurisdiction of the United States of America, including the District of Columbia.

SIXTH: Defendant denies the allegations contained in paragraph "14" of the complaint except admits that from time to time during the time of plaintiff's employment with defendant firm, the exact dates being uncertain, plaintiff asserted certain unfounded and bizarre tales in regard to imagined "conspiracies" and "plots" against her to various senior attorneys at defendant firm, including Murray C. Spett, whose name appears as a senior partner in the title of the defendant firm.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

SEVENTH: During the last several months of plaintiff's employment with defendant firm, plaintiff appeared to have

become obsessed with one of the younger unmarried attorneys then employed by defendant. After plaintiff's advances to said attorney were rejected, plaintiff took increasing amounts of time from the attorneys for whom she worked to complaint about imagined plots and conspiracies to divulge "secret" information which plaintiff seemed to believe was contained in her personnel file.

EIGHTH: At all times pertinent to this action defendant's personnel files contained nothing but the usual information necessary for personnel management, income tax withholding and medical and hospitalization insurance benefits. Upon information and belief the "secret information" which plaintiff feared that would be divulged was her age, which at the time was approximately 43 years.

NINTH: The attorneys for whom plaintiff worked, at first, made inquiries as to the basis for plaintiff's complaints and after determining that there was no basis in fact for plaintiff's complaints, became of the belief that plaintiff was experiencing an emotional breakdown. Plaintiff's work declined in quality from adequate to completely unsatisfactory. The attorneys for whom she worked attempted to humor and placate her and suggested on various occasions that she might consider professional help with her emotional problem.

TENTH: As the last months of her employment approached, plaintiff's claims and stories became more and more bizarre and she insisted on taking these unfounded allegations beyond her immediate superiors who liked and desired to help her, to the defendant firm's management and thereafter to various senior attorneys with defendant firm.

Answer

ELEVENTH: During the last week of her employment, the attorneys for whom she worked instructed the plaintiff that since no foundation in fact could be found for her allegations of conspiracies and plots which, by this time, extended not only to the young attorney, who was the original object of her attention, but to other employees and attorneys as well, that the plaintiff must use restraint and stop annoying the senior attorneys with her tales of plots and "secret files" and from distracting these busy attorney from their work.

TWELFTH: On the day before plaintiff was discharged she refused to do any work, refused to return to her desk and insisted on standing outside the doorways of the offices of at least two of the senior attorneys at defendant firm and she refused to leave until she could "inform" these attorneys of the "plots and conspiracies" against her. The attorneys for whom she worked at this time became of the opinion that since plaintiff would not seek professional help and that because she was completely obsessed by imagined plots and conspiracies she could no longer perform the functions for which she was employed. The managing partner of the firm came to the same conclusion at the same time and at a meeting with plaintiff in which attorneys Abraham Shapiro, now deceased, Emmauel Haber, now Judge Haber of the Civil Court of the City of New York, and Sheldon Bunin, were present, the plaintiff was discharged for the foregoing reasons.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

THIRTEENTH: Subsequent to her discharge and, upon information and belief, on or about February 4, 1977, plaintiff applied to the New York State Department of Labor Unemployment Insurance, Section for Unemployment Benefits,

which benefits were denied to her because of a determination that plaintiff was disqualified because of loss of employment due to misconduct in connection with her employment.

FOURTEENTH: Thereafter, plaintiff demanded and received a hearing before a referee, Leonard F. Cirabisi. Said hearing was held at the offices of the New York State Department of Labor, Two World Trade Center, New York, New York, at which hearing plaintiff and her attorney were present and a representative of defendant firm and an attorney for that firm were also present.

FIFTEENTH: After a full hearing and by Decision and Notice of Decision dated July 1, 1977, a copy of which is annexed as Exhibit A, the referee held that the evidence established that the plaintiff was discharged because of her misconduct in connection with her employment and not as the result of any other cause. Defendant, firm, having annexed said decision hereto, begs leave to refer to the same in this action.

SIXTEENTH: On or about August 8, 1977, plaintiff filed an appeal to the Employment Insurance Appeal Board, Appeal No. 252,174, seeking that the decision of the referee should be reversed.

SEVENTEENTH: Upon information and belief said appeal was unsuccessful, the original decision was adhered to and plaintiff took no further action in regard thereto.

EIGHTEENTH: At the hearing and proceedings hereinabove referred to at which testimony under oath was taken before a referee with authority to find facts, the referee found that the evidence established that the plaintiff was discharged because of misconduct in connection with her

employment. That plaintiff had been warned that she was persistently pursuing a matter which was based on plaintiff's own allegations and on which she could offer no substantial proof or evidence to indicate that which she was complaining of had actually occurred. That plaintiff's complaint that information was being given from her confidential files was checked on by two separate individuals of the firm and found to be unfounded and that she was told to drop the matter but she persisted in bringing the matter to the attention of two senior members of defendant firm. The referee further held that the plaintiff should have been aware that her persistence in pursuing a matter, in which she could offer no substantial proof of having had occurred might very well lead to and did, in fact, lead to her discharge. The referee in addition found that there was no evidence that any personal information had been given from defendant's file. That many of plaintiff's accusations were based on assumptions and not on fact and that plaintiff had been warned to drop the matter since she had no proof concerning her allegations.

NINETEENTH: The proceedings in the New York State Department of Labor which were reviewable in the courts of the State of New York constituted a full and fair opportunity to litigate all of the issues raised in this action, to wit: the reasons for and the justification of her discharge from employment with defendant firm. That after a full hearing on the facts at which testimony under oath was taken and where plaintiff had the right to examine and cross-examine witnesses and where plaintiff had been represented by counsel who did in fact examine and cross-examine witnesses, the plaintiff is now collaterally estopped and barred by the doctrine of *res judicata* from litigating the same issues in this action which she had been previously afforded an opportunity to litigate.

Answer

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

TWENTIETH: Upon information and belief the plaintiff has not complied with the statutory prerequisites for the commencement of this action and the complaint is defective by reason of the fact that Exhibit A annexed thereto is dated August 6, 1979 and *prima facie* the plaintiff had 90 days from that date to commence an action.

TWENTY-FIRST: This action has not been timely commenced and is barred by Title 29 U.S.C. Section 255, Title 42 U.S.C. Section 2000e-5 and such other statutes, rules and regulations in such cases made and provided with respect to the time interposing a claim and of the commencement of this action.

WHEREFORE, the defendant demands judgment dismissing the complaint herein.

Dated: New York, New York
May 13, 1980

WEISMAN, CELLER, SPETT,
MODLIN & WERTHEIMER
Defendants Pro-Se

By Sheldon Bunin
Attorney-at-Law
425 Park Avenue
New York, NY 10022
(212) 371-5400

JUDGMENT APPEALED FROM DATED DECEMBER 16, 1980

80-2303

ALICE J. HOFFMAN

Plaintiff

-against-

WEISMAN, CELLER, SPETT, MODLIN and WERTHEIMER

Defendants having moved to dismiss and for summary judgment, and for costs and attorneys' fees, and the said motion having come before the Honorable Constance Baker Motley, United States District Judge, and the Court thereafter on December 9, 1980, having handed down its memorandum opinion granting the motion for summary judgment and dismissing the complaint for failure to state a claim under Title VII, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N.Y.
December 16, 1980

s/ Raymond F. Burghardt

ORDER AND DECISION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York on the twenty-eighth day of April, One Thousand Nine Hundred and Eighty-One.

Present:

HONORABLE J. EDWARD LUMBARD,

HONORABLE WALTER R. MANSFIELD,

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

Filed April 28, 1981
A. Daniel Fusaro, Clerk

Dkt. No. 81-7026

ALICE J. HOFFMAN,

Plaintiff-Appellant,

-against-

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Defendants-Appellees.

Order and Decision

Alice J. Hoffman, who was employed by the defendant law firm as a secretary, appeals from a judgment of the Southern District of New York entered on December 16, 1980, pursuant to a memorandum opinion of Judge Constance Baker Motley dismissing her complaint which claimed that she was discharged because of her sex in violation of Title VII of the Civil Rights Law of 1964, 42 U.S.C. §2000e-2(a), and sought back pay, injunctive relief, and attorney's fees. The essence of her claim is that she was discharged because certain of the defendant's employees improperly gained access to her personnel file and spread false rumors about her.

After careful review of the record, briefs and oral argument, we affirm the judgment substantially for the reasons stated by Judge Motley. The complaint, while alleging plaintiff was discharged because of her female sex, fails to allege any facts supporting the allegation. The fact that a male lawyer may have instigated the discharge does not state a claim. All secretaries on the staff were women. There is no claim that plaintiff was qualified for but was refused employment as a lawyer, which might have stated a Title VII claim since the legal staff was apparently all male. Nor is there a claim that plaintiff was replaced by a male secretary. Even if she had alleged that she was discharged in violation of her terms of employment, this would not in any event state a claim over which a federal court, as distinguished from a state court, would have jurisdiction.

s/ J. Edward Lumbard
J. Edward Lumbard, U.S.C.J.

s/ Walter R. Mansfield
Walter R. Mansfield, U.S.C.J.

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland, U.S.C.J.

Opposition

No. 81-179

Office-Supreme Court, U.S.
FILED
AUG 29 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

ALICE J. HOFFMAN,

Petitioner,

vs.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Respondent.

MEMORANDUM IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN SHERMAN
Attorney for Respondent
425 Park Avenue
New York, New York 10022
(212) 371-5400

Sheldon Bunin
Of Counsel

QUESTION PRESENTED

Where petitioner sued alleging her discharge was in violation of the Civil Rights Act of 1964 (42 U.S.C. 2000e, et seq.), but who after five unsuccessful proceedings before administrative agencies, including a full evidentiary hearing which found that she was discharged for cause and two appeals and after having had answers to interrogatories was totally unable to produce a shred of evidence in support of her allegations, was it error for the District Court (S.D.N.Y.) to dismiss the complaint on motion and did the Court of Appeals (2nd Cir.) err in affirming the District Court on appeal?

PARTIES

The parties before the United States Court of Appeals for the Second Circuit were the petitioner herein and the respondents herein.

TABLE OF CONTENTS

Page

Questions Presented i

Parties ii

Table of Contents iii

Table of Citations iv

Statement of the Case 1

Reasons for Denying the Writ 15

POINT I

PETITIONER FAILED TO ESTABLISH THAT SHE HAD A TITLE VII ACTION AND SUMMARY JUDGMENT WAS PROPERLY GRANTED

CONCLUSION 30

Statutes Cited

42 U.S.C. §2000e-2 ..... 1, 15, 16, 17, 18, 24

Rules Cited

Rule 12(c) Fed.R.Civ.P. ... 1, 2, 16, 17

Rule 56 Fed.R.Civ.P. 1, 2, 17

Cases Cited

Bruce v. Martin-Marietta Corp., 544 F.2d, 442 6th Cir. (1976) 20

Bryant v. Com. of Ky., 490 F.2d 1273, 6th Cir. (1974) 20

Daily Press Inc. v. United Press International, 412 F.2d 126, 6th Cir. (1969), cert. den., 396 U.S. 990 19

Marks v. U.S. (Dept. of Justice), 578 F.2d, 261 9th Cir. (1978) 19

Rodriguez v. Board of Education of Eastchester Union Free School District, 620 F.2d 362, 2d Cir. (1980) 20, 21, 23

STATEMENT OF THE CASE

Petitioner, a former clerical employee of respondent law firm, was discharged after she persisted in making unsupported accusations of serious wrongdoing against four of the firm's employees, one man and three women, after having been warned that the continuation of such practice would result in her discharge. Petitioner sued alleging that her discharge was the result of sex discrimination against her in violation of Title VII of the Civil Rights Law of 1964.[1] Respondent moved in the United States District Court (S.D.N.Y.) pursuant to Rule 12(c)

[1.] 42 U.S.C. §2000e-2, referred to throughout this brief as "Title VII".

Fed.R.Civ.P. and Rule 56 Fed.R.Civ.P. for an order dismissing the complaint and for summary judgment. That motion was granted and the United States Court of Appeals for the Second Circuit has affirmed.

On or about May 4, 1976 petitioner was hired by the law firm as a legal stenographer. Toward the end of 1976 she had made accusations to Mr. Haber, the partner in charge of the department in which petitioner worked, claiming that one of the younger attorneys, Mr. Feldman, who was associated with the firm but who was not connected with that department, was improperly tampering with her personnel file. (A-36).[2]

[2.] References to "A" are to pages of the appendix before the Court of

[footnote cont'd next page]

As the weeks passed, petitioner's complaints and accusations became more frequent and widened to encompass complaints of nefarious doings not only against Mr. Feldman but three other employees of the firm who were women. These complaints and accusations were brought to the attention of Mr. Haber, later to Mr. Spett, one of the senior partners, and Mrs. Sotsky, the firm's personnel manager, on multiple occasions. Mr. Haber, Mr. Spett and Mrs. Sotsky made appropriate, informal inquiries to determine if there was any basis in fact for these persistent and bizzare accusations; however, no one in the firm making

---

Appeals, references to "CA" are to the cross-appendix, permitted by order of the Court of Appeals because of petitioner's refusal to reproduce material detrimental to her case.

inquiries into petitioner's claims could find any factual basis for her stories of unauthorized spying into files of a secret or confidential nature, which petitioner imagined was taking place, or of her claims in regard to rumors or secret memoranda of undisclosed nature, which she had convinced herself were being circulated and which she claimed were of a slanderous nature.

Shortly before petitioner was discharged, petitioner came into the office of Mr. Bunin, one of the attorneys for whom she worked, and told him that the conspiracy against her had to be exposed. (A-39) Petitioner's idea was to bring her wholly unsupported accusations in regard to Mr. Feldman, the two women who worked

in the bookkeeping office and the woman who served as chief file clerk to some of the firm's senior partners. Petitioner intended to see Mr. Modlin who was the principal partner of the firm.[3] (A-39) Mr. Bunin told petitioner, in no uncertain terms, that these attorneys were extremely busy and that they did not involve themselves with the day-to-day personnel problems and that if she approached them in the state in which she then appeared, she would most certainly be discharged. Mr. Bunin also told petitioner, as Mr. Haber had previously (A-37), that he thought she needed medical or psychiatric help and that

---

[3.] Plaintiff also saw Stanley Schlesinger, then a named senior partner who had no part in the firm's management (A-39), but the record does not disclose what if anything was said between petitioner and Schlesinger.

she should get such help promptly. (A-39) Petitioner did not heed Mr. Bunin's warning and on the following day, or perhaps the day after, Mr. Bunin found that petitioner was not at her desk. Mr. Bunin found petitioner at the door of one of the senior partners and he told petitioner that he wished her to return to her desk. Petitioner refused. (A-39) Petitioner said that the conspiracy against her had to be exposed. (A-39) She adamantly refused to move or to return to her desk. (A-39, 40) In his affidavit (A-72, 73) Mr. Modlin stated that he recalled a conversation with petitioner in his office. On that occasion he was confronted by petitioner, who appeared to be barely coherent and who was making what seemed to him to be reckless and

unfounded charges against certain of the firm's valued employees. He asked petitioner for some substantiation of her charges. Mr. Modlin received nothing from petitioner from which he could make any sense and it appeared to him that petitioner was seriously disturbed and totally out of control. Mr. Modlin made inquiries of petitioner's allegations and performance and ascertained that her allegations were groundless and that petitioner's work performance was unsatisfactory. Accordingly, Mr. Modlin directed that petitioner be discharged.

Shortly after her discharge a proceeding was commenced in the New York State Department of Labor (A 16-21) and a hearing was held before the New York State Department of

Labor, Unemployment Insurance Referee Section. At that hearing, before Referee Leonard F. Cirabisi, testimony under oath was taken of petitioner and certain of the firm's employees. Each party was represented by counsel and each party had the right to examine and cross-examine. The issue before the Referee to be tried was whether or not petitioner had been discharged for good cause. In a decision dated July 1, 1977, the Referee held, after hearing the sworn testimony of the parties, that the evidence established that petitioner was discharged because of misconduct in connection with her employment. (A 20-21) The decision of the arbitrator was affirmed on appeal. (A-47)

Throughout the proceedings in the

Courts below and now before this Court as well, petitioner has twisted, distorted and misrepresented the facts. While petitioner's factual machinations all pertained to peripheral and wholly irrelevant issues, certain of petitioner's misstatements in regard to the state of the record before the Second Circuit which are contained in the petition are so gross, prejudicial and shocking that they must be brought to the attention of this Court. With the exception of petitioner's own self-serving assertion of such, the record below contained no evidence of, or any reason to believe that evidence exists, which would establish that: (a) Feldman or any other employee of respondent was tampering with petitioner's personnel file; (b) rumors of any description

were being circulated in regard to petitioner; (c) a memorandum of any description adverse to petitioner or otherwise had been prepared, circulated, destroyed or was made a subject of interest by any employees of the firm; (d) about a month before petitioner's discharge she again learned Feldman was still seeking data from her confidential file; (e) Spett admitted that Feldman was trying to get data from petitioner's file or that Feldman won the cooperation of other employees; (f) Modlin, Spett and Haber, partners of the firm, all encouraged petitioner to stand up for her rights, but then conspired to fire her for "speaking up too much"; (g) the firm's personnel manager had knowledge of Feldman's "activities" and "confirmed that a disparaging

memorandum was being prepared likely at the behest of Feldman"; (h) the firm had knowledge of Feldman's alleged attempts to invade petitioner's file; and (i) the firm had knowledge of Feldman's alleged attempts to involve other employees in his alleged machinations or that Feldman or anyone else, in any respect, attempted to harass, humiliate or embarrass petitioner.

Now for the first time in any proceeding, petitioner (at page 4 of her petition) makes the scandalous and wholly unsupported false claim that there were gross irregularities in the conduct of the proceedings before the City Commission on Human Rights because of ex parte conferences with members of respondent firm. Peti-

tioner had appealed the decision of the City Commission on Human Rights and was represented by counsel. Petitioner's appeal brief captioned "Alice Hoffman-against-Weisman, Celler, Spett, Modlin, Wertheimer & Schlesinger", reproduced in its entirety in respondent's cross-appendix (CA 87-92), significantly makes no such claim of irregularities or improprieties.

It is also incomprehensible, after reading the Notice of Conference and Production of Records of the City Commission on Human Rights, reproduced at CA 67 and 68, how petitioner could now claim, as she does for the first time before this Court, that the proceedings before that commission were not adversary proceedings.

Again, at page 8 of the petition, in referring to the proceedings before the New York State Department of Labor relating to her unemployment insurance claim, petitioner, for the first time in any proceeding, now makes the wholly unsupported, false and scandalous claim that "ex parte contacts were maintained between the unemployment insurance referee and the respondents". The decision of the arbitrator in the New York State Department of Insurance was also appealed and petitioner was represented by counsel. Her appeal brief in that proceeding is reproduced in its entirety at CA 38-42. It would seem that any such claim of improper ex parte contacts between representatives of respondent and the arbitrator, if such claim had any basis whatsoever, could have and

would have been properly raised in that appeal. Petitioner's appeal brief in the proceedings before the New York State Department of Labor fails to disclose any hint of such claim as she now makes for the first time.

As for petitioner's personnel file, it consisted of her name, address, phone number, salary, social security number and age. (A-41, 64, 65, 66)

POINT I

PETITIONER FAILED TO ESTABLISH THAT SHE HAD A TITLE VII ACTION AND SUMMARY JUDGMENT WAS PROPERLY GRANTED

Petitioner's sole claim was that she was discharged because her word was not accepted over the word of a male attorney. Her discharge, petitioner reasoned, must have been based on sexual discrimination. This is the entire sum and substance of her claim under Title VII. An analysis of the complaint itself negates any claim that the alleged wrongful acts were done with the knowledge, consent, acquiescence or approval of respondent or that these alleged acts were ratified by respondent.

It is evident that petitioner had not alleged and could not have estab-

lished facts sufficient to show that her discharge was in any way sexually motivated. The Courts below acted properly in dismissing the complaint pursuant to Rule 12(c) Fed.R. Civ.P. because it simply did not state a Title VII action when analyzed and viewed in the light of her interrogatory answers (CA 1-37) and the exhibits annexed to those answers (CA 38-92) which showed that she had no support for her accusations other than her own assertions and conclusions.

Rule 12(c) Fed.R.Civ.P. provides that if on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary

judgment and disposed of as provided in Rule 56. This certainly was done in this case and as provided in Rule 12(c) Fed.R.Civ.P., all parties were given a reasonable opportunity to present all material made pertinent to a motion under Rule 56. The District Court did not limit itself to the four corners of the complaint, but rather availed itself of matters outside of the pleadings which were indeed presented and not excluded by the court. Proceeding, as the court did in this case, under Rule 56 Fed.R.Civ.P., the court was entitled to view the complaint as a whole and determine in light of petitioner's later statements on deposition, answers to interrogatories and in affidavits whether or not petitioner's action was truly an action under Title VII or whether it

was really a tort action for the various specifications of wrongdoing alleged in the complaint and merely couched as a Title VII action for the purpose of obtaining access to the federal courts.

The relevant facts required to make a full determination of this action, apart from petitioner's wholly unsupported speculations and conclusions, were not in dispute. Petitioner had argued in her brief to the Second Circuit that the issue of whether or not she was discharged as the result of sex discrimination in violation of Title VII is a question of fact requiring trial. That central issue, like the allegation of "negligence" in an accident case, is an ultimate conclusion which is reached

by application of the law to the facts at trial if the facts are in dispute or by the court on summary judgment if the facts are not in dispute or if there are no facts to support the conclusory allegation. If petitioner's view was correct, then summary judgment can never be granted against a plaintiff in a discrimination case where the plaintiff alleges that he or she was discriminated against, since this would always be a question of fact requiring trial. Conclusory allegations of the complaint cannot be relied upon to withstand a motion for summary judgment. Daily Press Inc. v. United Press International, 412 F.2d 126 6th Cir. (1969), cert. den., 396 U.S. 990, and conclusory allegations unsupported by factual data will not create a triable issue. Marks v. U.S.

(Dept. of Justice), 578 F.2d 261 9th Cir. (1978). Neither do conclusory allegations establish an issue of fact for the purposes of opposing summary judgment. Bruce v. Martin-Marietta Corp., 544 F.2d 442 6th Cir. (1976). When a movant brings forward and supports his motion for summary judgment, his opponent may not rest merely on his pleadings, but rather must come forward to show genuine issues of fact; and mere conclusory and unsupported allegations rooted in speculation do not meet that burden. Bryant v. Com. of Ky., 490 F.2d 1273 6th Cir. (1974).

Petitioner relied heavily in the Second Circuit upon the view expressed by that Court in Rodriguez v. Board of Education of Eastchester Union Free

School District, 620 F.2d 362 2d Cir. (1980). The plaintiff in Rodriguez, contrary to the case at bar, was able to present prima facie evidence related to her claim of sex discrimination, or at least evidence showing the probability that such evidence existed [Rodriguez, supra, p. 364]. Rodriguez is entirely distinguishable from the case at bar because in Rodriguez, plaintiff had alleged specific facts which were connected with and supported plaintiff's conclusion that she was the victim of sex discrimination and which, if proven, could have factually established that she was indeed the victim of such discrimination.

In the case at bar, the facts alleged by petitioner bore no logical

or factual connection with the ultimate conclusion contained in paragraph 20 of the complaint (A-8) that her discharge resulted solely from sex discrimination. The key fact which petitioner in this case attempted to establish through interrogatories was that all of the attorneys who worked at the firm were male and the clerical staff were female.[4] This is clearly irrelevant to the issue of whether petitioner's discharge resulted from sex discrimination as the District Court noted in its decision.

In the case at bar, petitioner served and received answers to those of her interrogatories which were not

---

[4.] The District Court specifically held this to be irrelevant.

stricken by the Court as being improper. Furthermore, petitioner had the opportunity in proceedings before the New York State Department of Labor, in which proceeding she alleged that her discharge was wrongful and not for cause, to call witnesses, to examine and cross-examine, and to elicit facts through testimony or the production of documents. In that proceeding, petitioner was represented by counsel who did in fact examine and cross-examine witnesses; and clearly in that proceeding petitioner had every reasonable opportunity to discover facts or to present facts in support of the conclusion which she had urged. In Rodriguez, plaintiff did not have the advantage of obtaining evidence through prior proceedings which

petitioner here has had.[5]

Point I of the petition cites Title VII of the Civil Rights Act of 1964, excerpts from the Congressional hearings prior to the passage of that Act and numerous cases, all for the proposition that discrimination based on sex is contrary to law and that the act making such discrimination illegal should be liberally construed. We agree. Discrimination based on sex is unlawful and wrong. This is not, however, and never has been, the issue in this case, although petitioner now seeks to give this Court the impres-

---

[5.] A review of the record will indicate that petitioner had annexed as exhibits to her answers to defendant's interrogatories a voluminous compendium of material (CA 38-92) which she had every right to draw upon and did in fact draw upon in the proceedings before the district court.

sion that the adverse decisions to petitioner in the District Court and the Court of Appeals resulted from some incorrect interpretation of the statutory and case law in this area or, as inferred in the petition at page 15, that the District Court misinterpreted the law to the extent of having held in effect that petitioner was discriminated against, not because she was a woman, but because she refused or objected to sexual flirting or overtures of Mr. Feldman.

Petitioner has omitted to reproduce the memorandum opinion of Judge Motley, which appears at page A-84 of the appendix before the Court of Appeals. Contrary to the statement made at page 3 of the petition

that the complaint was dismissed for failure to state a claim, and not "because petitioner had not proved her case", Judge Motley's memorandum opinion, in full, stated:

> The within motion to dismiss the complaint for failure to state a claim under Title VII is granted.
>
> The within motion for summary judgment is granted. The affidavits and depositions make it clear that plaintiff's complaint is that she was fired because she complained about other employees improperly invading her personnel file and then spreading rumors about her. Plaintiff has not produced a shred of evidence, other than her own assertion, that her sex was the sole cause of her discharge. Plaintiff was employed by defendants as a secretary. It should be noted that plaintiff admits that all of defendants' secretaries are female. Plaintiff lacks standing to complain that all of defendants' lawyers are males. This action is hereby discontinued. (Underscoring ours)

It is apparent from a reading of Judge Motley's opinion, which was cited with approval by the Second Circuit, that the complaint was dismissed not because petitioner had failed to prove her case, but because she had not produced a single shred of evidence, other than her own assertion, that her sex was the sole cause of her discharge.

Petitioner (at page 15 of the petition before this Court) has the temerity to state that "[t]he record, in its current posture, portrays a superior, placing a female subordinate in a substantial [sic] employment condition which he would not seek to levy upon a man. This situation is quite different from instances of sexual affairs between employees of

the same employer which are not tied to employment opportunity in any way." In the first instance the implied suggestion, in making such a statement that there was "an affair" between Mr. Feldman and petitioner, is absurd. The record clearly shows, and petitioner admits at page 5 of the petition, that Mr. Feldman refused petitioner's social "invitation". While at page 5 of the petition, it is claimed that Mr. Feldman approached petitioner and "made a pass at her", the record is totally and completely devoid of any support for such a statement. Even if petitioner had misconstrued Mr. Feldman's effusive smile, of which petitioner also complains (at page 5), it is conceded by petitioner that it was she who invited Mr. Feldman to her house and

not the other way around. We have failed to find any case cited in the literature in which it was held to be sexual harassment, of a female employee, by a male, where the male had declined the female's invitation. Perhaps that time will come someday but we are not there yet.

While the petition (at page 15) states that "it cannot be doubted but that Feldman's treatment of petitioner was a form of harassment", sexual harassment by Mr. Feldman is, or at least has never been, a part of petitioner's case against the firm. Petitioner's claim is that she was discriminated against because the firm took the word of Mr. Feldman over hers allegedly because she was a woman. There has never been the

slightest shred of proof (only the naked and unsupported allegations of petitioner, which were denied by the accused employees) that the firm condoned or knew that petitioner was in any respect being harassed by Mr. Feldman or anyone else.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

JOHN SHERMAN
Attorney for Respondent

Petitioner's Reply Brief

No. 81-179

Office - Supreme Court,
FILED
SEP 16 1981
ALEXANDER L. STEWA
CLERK

In The

Supreme Court of the United States

October Term, 1981

ALICE J. HOFFMAN,

Petitioner,

vs.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN ANSWER TO RESPONDENT'S OPPOSITION TO CERTIORARI

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

5280 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

No.

In The

Supreme Court of the United States

October Term, 1981

ALICE J. HOFFMAN,

Petitioner,

vs.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN ANSWER TO RESPONDENT'S OPPOSITION TO CERTIORARI

Petitioner finds it necessary to file a reply to the intemperate and factually inaccurate opposition by the respondent to her petition for certiorari.

For some strange reason, respondent employs epithets such as "scandalous and wholly unsupported false claim" with respect to alleged irregularities in the conduct of proceedings before the City Commissi[illegible] on Human Rights (*see* page 11 of respondent's opposition). Respondent further says that this and other claims are made for the "first time" in any proceedings.

The *respondent*, characteristically, *is wrong*, since in an affidavit dated the 15th day of September 1980, filed in the United States District Court, signed by petitioner, on pages 5 and 6 thereof, the specific sworn statement by petitioner was made that the City Human Rights Commission and the EEOC violated her due process rights and held *ex parte* proceedings.

In addition, she stated, under oath, that she and her counsel were never permitted to cross-examine either Mr. Feldman or Mr. Spett, nor were they permitted to obtain statements from these individuals which had been supplied to the Hearing Officer. No right of cross-examination of these individuals was afforded, she affirmed, and made a number of other allegations of denial of fairness and due process.

In view of the foregoing affidavit of September 15, 1980 sworn to by petitioner in the United States District Court, it is inconceivable that respondent should make the bald-faced statement that for the first time such allegations have been made in this Court and, indeed, an apology should be submitted.

This is substantially true of virtually all of the protests which respondent makes in its brief in opposition to certiorari, since a perusal of the record will reveal that petitioner has not invented matters for the first time.

Furthermore, in a memorandum of law filed in the United States District Court on behalf of petitioner, by the firm of Wishod & Fisch, Esqs., and signed by Bernard Weitzman, a member of the firm, which memorandum was in opposition to a motion by the respondent (defendant below), the petitioner (plaintiff below) specifically stated that the proceedings before the Unemployment Insurance Department of the State of New York were not "adversary" proceedings. Here, *again, respondent is totally incorrect* in stating that these matters are revealed to the Court for the "first time."

The irresponsibility of respondent, coupled with their unnecessary vituperation, leads one to recall the oft-quoted platitude "Methinks the man doth protest too much".

We must bear in mind that the charge here, *inter alia*, is sexual harassment, and ...e plethora of papers heretofore filed in the various proceedings amply support all the statements made in the petition.

In an affidavit in support of a motion for reargument and reconsideration in the court below, petitioner had indicated that the respondent and Mr. Feldman had conducted a campaign to harass and humiliate her.

We ask this Court to note that Title VII of the Civil Rights Act of 1964 sustains a charge of sexual harassment under the conditions set forth in the papers filed in the court below and in the petition herein.

The respondent also insinuates that petitioner had a "relationship" with Mr. Feldman. There is no support for that statement at all. Mr. Feldman had initially approached petitioner, not vice-versa. Moreover, he continued to approach her on several additional occasions. At no time did petitioner initiate any conversations, but, rather, responded solely to Mr. Feldman's overtures, which she shortly learned were totally insincere and in the nature of sexual harassment.

Petitioner also sharply contests the assertion by the respondent that her discharge was because of her work performance, since not only was she performing her work well, but had recently been granted a pay raise by the respondent firm. The raise, as a matter of fact, was granted despite the fact that she was employed only a relatively short time and palpably was in recognition of superior ability and service.

Petitioner repeats and realleges her statements in the petition and asks this Court to totally reject the unfounded, vituperative, and unbecoming response of the respondent.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioner